SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

No. 114.

ALBERTO ARMSTRONG, AS LIQUIDATOR OF BOYSEN & COMPANY, APPELLANT,

versus

EDUARDO FERNANDEZ, JUAN BAUTISTA PACHECO, AND GENARA JUSINO, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF FOR APPELLANT.

Statement.

This cause originated in the United States District Court for Porto Rico, so named in the act of Congress creating a civil government for that island, by the filing of an involuntary petition in bankruptcy on the part of the three appellees against one Pascasio Alvarado on the 29th day of March, 1906 (Record, p. 1). Upon the same day a subpœna issued to said Alvarado, requiring him to answer said petition on the 13th day of April following, which process was served on said Alvarado on March 30, the day follow-

ing the filing of the petition (Record, pp. 3-4). On April 24, 1906, an order was made by the clerk of the court, reciting the absence of the judge from the division of the district in which the petition had been filed "on the next day after the last day on which pleadings might have been filed," etc., and referring said petition generally to the referee in bankruptcy for that division (Record, pp. 4-5).

The referee in bankruptcy proceeded with the cause from the date of reference until the 8th day of May following, on which day he returned the papers in the cause into the clerk's office, together with a "finding and order" dismissing said petition (Record, pp. 5-8). This document concluded (page 8) with the following paragraphs:

> "While leave to amend could have been granted had application for same been made within the statutory time, the latter having expired no such amendment can be allowed, as the same act of bankruptcy could not be alleged, as it would not be a true statement of the facts.
>
> "Wherefore the undersigned referee finds that the petition aforesaid ought to be, and is hereby, dismissed with costs to the petitioners."

The case stood thus until early in July (the exact day does not appear from the record), when a motion for a rehearing was made before the referee and by him granted on July 6, and that order filed in the clerk's office the following day, July 7 (Record, p. 9), which order stated that "the order dismissing the petition be, and hereby is, set aside," and petitioners were allowed to amend their petition.

Meantime the judge of the court had come into the division of the district in question and was holding a term of the court; whereupon counsel for the same creditor on whose motion the petition had been dismissed by the referee, the present appellant, filed in the court, on the 16th day of the same July, their motion to annul and set aside the above order made by the referee on July 6 (Record, p.

9). This motion was denied by the court (Record, p. 10). The order of the referee of July 6 and the denial of our motion to set that order aside form the basis of the first two assignments of error.

As a part of the same order which denied our motion to annul the last order of the referee, the court allowed petitioners to amend their involuntary petition, set aside the order of reference, and allowed the petition to remain pending in the court for further proceedings; to which ruling we excepted. As soon as the petition was amended counsel for appellant filed another motion to dismiss (Record, pp. 10-11), which was also denied; and this ruling is the basis of the third error assigned.

The petitioning creditors then again amended their petition by negativing the exceptions contained in the statute as to occupation; whereupon the appellant, as an opposing creditor, by leave of the court filed his answer to the petition denying "the allegations of the involuntary petition that the alleged bankrupt does not come within the excepted classes of the bankruptcy act, and that he has committed the acts of bankruptcy therein alleged" (Record, p. 12). Thereupon, on the same day, a trial was had upon the petition and the denials of this answer, and the journal entry concludes: "The court, * * * at the conclusion of all the testimony overrules said answer and denial and directs that a proper order of adjudication and reference be prepared, to which counsel for Armstrong *et al.* except" (same page). Upon which finding formal orders were accordingly entered (Record, p. 13). These orders were dated July 19, 1906, and within the thirty days prescribed by General Order XXXVI (2) petition of appeal, appeal bond, and assignment of errors had been filed by appellant and an allowance of his appeal obtained from the judge (Record, pp. 14-17). In accordance with the same general order, the judge prepared certain findings of fact and conclusions of law, and of his own volition attached thereto a *verbatim* copy of the

evidence upon which he based the same (Record, pp. 17-28).

The errors assigned (Record, pp. 14-15) are as follows:

> "First, that the referee in bankruptcy erred in granting a rehearing to the petitioning creditors by his order of July 6, 1906, after he had made an order dismissing their said petition upon the motion of these opposing creditors and had returned and filed said order, together with all other papers in the case, with the clerk of this court.
>
> "Second, that this court erred in refusing by its order of July 16, 1906 (misprinted in record as July 6) to grant the motion of these opposing creditors to annul and set aside said order of said referee in bankruptcy of July 6, 1906, aforesaid.
>
> "Third, that this court erred in overruling the motion of these opposing creditors filed on July 18, 1906, to dismiss the petition of the petitioning creditors.
>
> "Fourth, that this court erred in finding from the evidence offered before the court on the 19th day of July, 1906, upon the issue between said petitioning creditors and these opposing creditors, that said Pascasio Alvarado should be adjudged a bankrupt, and in so adjudging him by its order of that date."

ARGUMENT.

I.

NEITHER THE REFEREE NOR THE COURT HAD ANY JURISDICTION TO REINSTATE THE CAUSE AFTER THE ORDER OF DISMISSAL MADE BY THE REFEREE ON MAY 8, 1906.

The first two assignments may be discussed together under the above proposition.

The powers and duties of the referees provided for in the bankruptcy act of 1898 (30 Stat. at Large, 543) are mostly

contained in sections 38 and 39, but in section 1, which is devoted to the "Meaning of words and phrases," it is stated in subdivision (7) that "'courts' shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee."

Next, section 18, which regulates proceedings after petitions are filed, provides with regard to the reference of involuntary petitions as follows:

> "*e*. If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.
>
> "*f*. If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee."

Then the next subdivision provides:

> "*g*. Upon the filing of a *voluntary* petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee."

It therefore appears that, while the prerequisites necessary to authorize a reference to a referee differ somewhat in the two cases, the authority of the referee, once the case is properly in his hands, is coextensive in the one case as in the other.

Let us now look at their jurisdiction as defined in section 38:

> "Referees respectively are hereby invested, subject always to a review by the judge, within the

limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of the judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings."

The following section (39) defines the "Duties of referees," and the subdivision which directly bears upon the present question is:

> "(7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, *when the cases are concluded.*" (Italics ours.)

Number 12 of the general orders in bankruptcy, issued by this court under the authority of said act, contains nothing affecting the foregoing provisions.

We therefore submit that, where a case has been referred generally to a referee, his action therein within the scope of his powers—*i. e.,* unless some question arises which the

act expressly says must be decided by the judge—carries the same force and validity as the action of the judge when there has been no reference; and that when, under the provisions of section 38, subdivision (1), the referee "considers the petition referred to him" and either "makes the adjudication" or "dismisses the petition," and thereafter, under section 39, subdivision (7), "transmits to the clerk the record * * * when the case is concluded," the order of dismissal is as authoritative and final as though made by the judge himself.

This is made still clearer by the provisions of section 42:

> "*a.* The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.
>
> "*b.* A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.
>
> "*c.* The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court."

There is no suggestion that the judge is to revise them, or that they differ in any respect as to the finality of disposition from other court records. And the authorities support our position.

> Neustadter *et al. vs.* Chicago, etc., Co., 96 Fed. Rep., 830.
>
> *In re* T. L. Kelly Dry Goods Co., 102 Fed. Rep., 747.
>
> *In re* Rosenburg, 116 Fed. Rep., 402.

The act does of course provide a method for obtaining a review of the actions and rulings of referees, a right which is indicated by the clause in the first sentence of section 38—

"subject always to a review by the judge"—and the proceeding for that purpose has been determined by the general order No. 27 of this court:

> "When a bankrupt, creditor, trustee or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

The courts have uniformly held that the method hereby provided is exclusive.

In re Schiller, 96 Fed. Rep., 400.
In re Russell, 105 Fed. Rep., 501.
In re Hawley, 116 Fed. Rep., 429.

Therefore, we submit, when the referee, on the 8th day of May, 1906, made his order and entered it at the end of his "record," denying the asking of petitioners to amend on the ground that the request had not been "made within the statutory time" and adjudging "that the petition aforesaid ought to be, and is hereby, dismissed with costs" (Record, p. 8); and when the petitioners failed to file with the referee any petition for a review of said order by the judge, in accordance with general order 27, above quoted; and when said referee had thereafter certified his record and filed it with the clerk of the court, the authority of the referee over the cause terminated; in other words, the order of reference became *functus officio*, and that official had no jurisdiction to make his order of July 6th; therefore the ruling of the court below denying appellant's motion to annul and set aside that order of the referee of July 6 was erroneous (Record, pp. 9-10).

We think it was equally plain, under the above-quoted provisions of the bankrupt act, that the judge himself had no authority to set aside the referee's judgment of May 8,

to reinstate the creditors' petition as a pending cause, and to allow it to be amended in the very respect upon which the referee had ruled it to be insufficient, and had dismissed it after holding that the time to amend had expired; therefore the order of the court below, made to that effect on July 16, was erroneous (Record, p. 10).

It was, of course, open to the petitioning creditors to obtain redress if any error was committed in the final judgment of the referee dismissing their petition by appealing to a higher court, if they were in a position to do so, just as we have done from a subsequent final judgment against our interest; but, not having done so, we submit that that judgment should stand.

II.

THE COURT BELOW SHOULD HAVE GRANTED THE MOTION OF APPELLANT, MADE JULY 18, 1906, TO DISMISS THE AMENDED PETITION OF APPELLEES.

The motion referred to and the ruling thereon are found on pages 10 and 11 of the record. As evidence was taken on the first ground set out in the motion and the court found as a fact that the petition had been filed in duplicate and ordered its records amended accordingly, we admit that this court will not review that ground. We insist, however, that the second ground of the motion was well taken and the same should have been granted. While at the beginning one or two decisions leaned toward the position that the exception of the statute regarding the occupation of the alleged bankrupt need not be negatived in the petition, the great weight of later authorities is with our contention:

In re Mero, 128 Fed. Rep., 630.
In re Callison, 130 Fed. Rep., 987.
In re Brett, 130 Fed. Rep., 981.
In re White, 135 Fed. Rep., 199.
Rise *vs.* Bordner, 140 Fed. Rep., 566.
In re Taylor, 42 C. C. A., 1.

The record shows that petitioners did not even ask for leave to amend until after our motion was denied, but stood upon the sufficiency of their petition. We therefore insist that the ruling of the court upon the motion was erroneous under the above authorities.

III.

THAT THE COURT BELOW ERRED IN ITS DETERMINATION OF THE ISSUE RAISED BY THE ANSWER OF APPELLANT TO THE CREDITORS' PETITION.

An inspection of appellant's answer (Record, p. 12) will show that by its terms three issues were made, to wit:

1st. Whether the alleged bankrupt was within the exceptions of the statute—that is, was a wage-earner or a person engaged chiefly in farming or the tillage of the soil.

2d. Whether said alleged bankrupt had committed an act of bankruptcy by permitting appellant to obtain an execution against him.

3d. Whether said alleged bankrupt had committed an act of bankruptcy by admitting his inability to pay his debts and his willingness to be adjudged a bankrupt.

We think it was necessary upon this issue that the petitioning creditors prove the negative of the first proposition—that is, prove that the alleged bankrupt was not included in the exceptions from the statute defining who could be adjudged bankrupts—and the affirmative of one of the two others—that is, the affirmative of either the second or the third.

The authorities all hold that, except touching one phase of the issue of insolvency where it arises, the burden of

proof is on the petitioning creditors to prove the allegations of their petition.

In re Pilger, 118 Fed. Rep., 206.
In re McLaren, 125 Fed. Rep., 835.
In re Doddy, Jourdan & Co., 127 Fed. Rep., 771.
Jones *vs.* Burnham *et al.*, 71 C. C. A., 240.

The allegations touching the second proposition were altogether insufficient to constitute an act of bankruptcy, even if proved, because not only must it be alleged that execution has been issued against the bankrupt's property, but that it is within five days of sale thereunder, and the bankrupt has not yet vacated or discharged it.

Seaboard Co. *vs.* W. R. Trigg Co., 124 Fed. Rep., 75.
In re Vastbinder, 126 Fed. Rep., 417.

But if the court will look either at the findings of fact made by the judge (Record, p. 18) or at the evidence itself, which the court attached thereto (Record, pp. 19-28), it will perceive that the petitioning creditors lost sight of every controversy except that as to the occupation of the bankrupt, and that the court later also made the same error, as there is neither finding nor evidence that the alleged bankrupt had committed either act of bankruptcy alleged or any act of bankruptcy whatever. In the absence of such proof, which it was the duty of petitioning creditors to furnish, there could have been but one proper finding, that Alvarado was not a bankrupt and that the petition should be dismissed.

But even upon the question of the occupation of the alleged bankrupt the findings of the court are very meager, really not enough to determine what was his occupation; but if the court feels at liberty to peruse the evidence, it will find that part of it which shows that said alleged bankrupt during the later years either owned or controlled

something like 1,400 acres of the land which in Porto Rico is used for farming—that is, which is fitted to raise coffee and other local products—while the stock of goods in his store (if it could be called a store where practically the business left was the collection of uncollectible accounts) was reduced to about $1,000.

But we shall not dwell upon this point, as those already discussed are so conclusive of this issue, merely contenting ourselves with citing a few of the decisions which treat of when a person will be considered as "chiefly engaged in farming."

In re Mackey, 110 Fed. Rep., 355.
In re Hoy, 137 Fed. Rep., 175.
Rise *vs.* Bordner, *supra.*
Wulbern *vs.* Drake, 56 C. C. A., 643.
Same case below, 114 Fed. Rep., 229.

IV.

As the question of the jurisdiction of this court is always open to inquiry, we will add a word on that point.

The appeal is taken under the terms and in the manner provided for in General Orders in Bankruptcy XXXVI, subdivisions 2 and 3, in conjunction with the provisions of section 24 of said bankruptcy act and section 35 of the civil government act of Porto Rico (31 Stats. at Large, 85). That the same should be by appeal and not by writ of error was decided in—

Elliott *vs.* Toeppner, 187 U. S., 327.

V.

We therefore submit, in conclusion, that the order or decree of the court below adjudging the said Pascasio Alvarado a bankrupt should be reversed, with directions either to al-

low the dismissal already entered on May 8, 1906, to stand as the final judgment of the court or to enter a judgment of dismissal upon the issues as joined and tried in the court below on July 19, 1906, for which we humbly pray.

Respectfully submitted,

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